



1996

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Richard Lowell Nygaard

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Recommended Citation

Richard L. Nygaard, *On Responsibility: Or, the Insanity of Mental Defenses and Punishment*, 41 Vill. L. Rev. 951 (1996).

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VILLANOVA LAW REVIEW

VOLUME 41

1996

NUMBER 4

ON RESPONSIBILITY: OR, THE INSANITY OF MENTAL DEFENSES AND PUNISHMENT

RICHARD LOWELL NYGAARD*

[E]xcept for totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots—who seldom commit murder or have the opportunity to commit murder—the great majority and perhaps all murderers know what they are doing, the nature and quality of their act, and the consequences thereof, and they are therefore “legally sane” regardless of the opinion of any psychiatrist.¹

“INSANITY” no longer means anything useful either scientifically or legally and should be stricken from our vocabulary. Nor are “diminished capacity” and the few other terms we in law use to denominate the myriad states of mind of much use to describe either the social danger or the remedial needs of an offender.² Yet, such misleading terms continue, long beyond their useful years, to mark the boundaries of criminal responsibility between certain criminal law offenders who will be treated with compassion, and the others who will be punished with vengeance.

In this Article, I posit that it is time to remove this line-drawing based upon semantic nonsense of sanity/insanity and responsibility/nonresponsibility, that is cast in a concrete, nonscientific theory, defined by arcane nineteenth century terms that, scientifically and jurisprudentially, are obsolete. It is also time to remove the determination of the accused’s mental health from the procedural theater of the criminal trial and the ad hoc groups of lay citizens whom

* Circuit Judge, United States Court of Appeals for the Third Circuit.

1. DR. GREGORY ZILBOORG, *MIND, MEDICINE AND MAN* 274 (1943).

2. See *State v. Corraera*, 430 A.2d 1251, 1253 (R.I. 1981) (stating that diminished capacity doctrine recognizes that defendant was not suffering from mental disease or defect that would eliminate all criminal responsibility because his mental capacity was diminished by intoxication, trauma or mental disease, so as to eliminate mental state or intent essential to particular offense charged).

we call upon to decide issues of guilt. Instead, I suggest that we place the primary emphasis about state of mind and receptivity to corrective or punitive measures where it belongs, with a panel of professionals, and at a hearing to determine what remedy is to be employed, and what containing, correcting or punishing measures are to be borne by the offender.³

Ascertaining the accused's basic mental capacity is significant to a threshold determination of who is capable of possessing a guilty mind at all. But intent, we are discovering, is a rather low threshold. An offender's state of mind, among many other factors, should become of greater significance, I suggest, in determining the reasons for the crime and to answer what should be the predominating question in the process: What shall we do with *this* person?⁴ The offender's sentence is supposed to be the remedy that will provide a safeguard for society against further predations by the offender, and it theoretically must be related to the gravity of the damage that would ensue if the act or acts were repeated. Unfortunately, in reality sentencing does not accomplish this objective. American penology is simply content to punish and seek revenge,

3. The idea is not novel, I must confess. Yet, it needs to be renewed. It was first proposed by Dr. William White in 1911. Since then, many other professionals from the health care disciplines have joined him. See, e.g., Justice Joseph Weintraub, Address to the Annual Judicial Conference of the Second Federal Circuit (June 25, 1964), in 37 F.R.D. 365, 369 (1964) (proposing that insanity as defense should not bear on adjudication of guilt, but rather on prosecution following conviction); MANFRED S. GUTTMACHER, M.D., THE ROLE OF PSYCHIATRY IN THE LAW 93 (1968) (discussing idea that whole psychiatric picture of defendant should be revealed by psychiatrists before deposition); H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW 12-29 (1964) (stating that courts should make efforts to assess whether person accused of crime is mentally sound before convicting him); KARL MENNINGER, M.D., THE CRIME OF PUNISHMENT 90-91 (1968) (stating that lawyers and psychiatrists are miles apart in their thinking on human behavior based on chronic misunderstanding and antagonism); THOMAS SZASZ, LAW, LIBERTY AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES 248 (1963) (advocating sharp distinction between role of judges and that of behavior scientists, and viewing compulsory counseling imposed by courts as "moral Fascism"); BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST 32-84 (1963) (discussing generally penal or preventative function of English courts and problem of mentally ill criminals in England); Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 515-19 (1968) (positing that psychiatrists do not function as successful healers of mental illness in criminal justice system, and that those prominent in criminal justice system reject idea of sanity as defense). I now join them.

4. *Mens Rea* remains a consideration in guilt, otherwise the process at least under most current laws may become constitutionally infirm. See *Morissette v. United States*, 342 U.S. 246, 261-62 (1952) (explaining that Congress's failure to enumerate intent as element of crime does not mean statute will be construed as eliminating intent, because of its importance in assessing existence of criminal behavior).

without regard for either the reasons for the crime or the consequences of the sentence.

Americans have an uneasiness about their penology, and for good reason. When one considers the vindictive nature of our sentencing policy, it is easy to find some tension between our revenge-based punishment, on the one hand, and the basic call to humanitarian consideration for our fellow citizens we claim to heed—and the need for incapacitating remedies for those who have made a decision to commit crimes—on the other. I suggest that the rancor, so evident in our sentencing scheme, adds nothing positive to the equation we should use to determine what to do with the criminal (including the calculating or career criminal). The entire trial procedure is cloaked in myth and formalistic ritual, for we seek dignity and order in such important decisions as dealing with criminal guilt or innocence. But the calm of the trial is in stark contrast to the psychological and physical cacophony that will follow for the convicted criminal in prison. And surely the notion of what we call retributivism, which is, in reality, revenge,⁵ runs counter to the predominant American faiths, enlightened notions of human cultural growth and social intercourse, the “moral bookkeeping” so fundamental to any rational correctional system and, significantly, the discoveries of science.⁶

5. See Richard Lowell Nygaard, *On the Philosophy of Sentencing: Or, Why Punish?*, 5 WIDENER J. PUB. L. 237, 247 n.45 (1996):

Some penologists labor greatly to distinguish “revenge,” as being personal reprisal and outside the law, from “retribution,” as being the law’s appropriate and somehow proportionate response. They fail. Retribution comes from the same place in the heart as revenge, and in the same place etymologically—*re* means back and *tribuere* means to pay. Retribution and revenge are Humpty and Dumpty; and when they philosophically fall, they will shatter identically.

Id.

6. Richard Lowell Nygaard, *Freewill, Determinism, Penology, and the Human Genome: Where’s a New Leibniz When We Really Need Him?*, 3 U. CHI. ROUNDTABLE 417, 421-23 (1997).

[I]n many areas, the . . . rigidity of law places it in great conflict with science, which yields constantly to new discoveries. This conflict is most marked in the unreality of American criminal law. Our criminal law’s philosophy must presume that individuals have a totally free will because our penology is motivated by revenge and the desire to punish offenders. . . . We seem to shun any evidence that might help us explore the genesis of crime for fear that the evidence will indicate that our philosophical bases for criminal sentencing and our penal modes themselves have fundamental shortcomings. Even worse, we fear being perceived as “soft” on crime. As a result, we rely upon an unscientific, underdeveloped theory of responsibility and blameworthiness.

Id. at 421-22 (footnotes omitted). “In the last decade . . . the evidence showing a link between violence, crime and mental illness has mounted. It cannot be dis-

Moreover, this uneasiness is most acute in the manner with which the criminal justice system copes with one who suffers from some mental impairment or a neurological or brain dysfunction, and who violates the law. None of us wants to be considered a bully for having taken advantage of either a mentally retarded individual, a deranged person or one who suffers from some cognizable mental disability. It is no surprise that we neither wish to execute the mentally disabled nor place them in physical peril through imprisonment. We draw the line at doing something so outrageous. It has, nonetheless, nothing to do with whether the accused "did it," or whether he is dangerous. Although a mentally disabled person may be as dangerous or more so than the "normal" ward of the criminal justice delivery system most of us do not want to be known as being so callous that we would kill or imprison a mentally deficient or similarly disabled person.

Theoretically, we rationalize our policy by contending that we want to be sure that before we inflict punishment upon one of our fellow citizens, he is truly capable of being held to account and responsible for his acts. But when we consider the "line-drawing" in which we engage to determine who will be killed, imprisoned, hospitalized, or who will be freed, the theory becomes bizarre. How we decide upon a person's state of mind—the tests and how they are applied—is a professional, philosophical and humanitarian nightmare, as well as a cultural embarrassment. We use the fiction of what is essentially a "yes/no" answer to one's "responsibility," to avoid punishing the mentally deficient offender and, as a result, seemingly infinite problems ensue.⁷

It is fundamental to any enlightened legal system that each of us must be held to account for our own actions. In any moral or ethical system, most acutely in the criminal justice delivery system, the basic concepts of "right" and "wrong" mean little if each individual is not required to account for applying them in the conduct of

missed; it should not be ignored." Peter Marzuk, *Introduction*, 53 ARCHIVES GEN. PSYCHIATRY 481, 481 (1996).

7. This conclusion also pertains to the trial of juveniles, whose status is created by law. See 18 U.S.C. § 5031 (1994) (defining "juvenile" as person who has not attained age of eighteen). I see no reason why one offender who is just short of a critical birthday should receive different treatment than one who has reached it. One must query, at what age does one become responsible: 3 years, 4, 5, 16, 26? The truth is that chronological age simply does not matter except to the extent time has exposed one to the information necessary to make responsible decisions. Some of us simply have not been given, or for various reasons have not developed, the psychological, mental or social equipment necessary to make responsible, pro-cultural decisions. Some of our citizens are part of the ecology of crime, not the culture we try so desperately to advance.

his or her own affairs. Our system shares with most other systems the prerequisite to culpability for crimes that the offender not only have "done" the act that the law forbids, but that he⁸ also have a threshold mental capacity to have done so with a specific or requisite will. That is to say, did he have the requisite free will to do other than commit the crime, or was his behavior somehow determined by a mental disorder?⁹ That which the law calls "insanity" is an excusing condition that negates the voluntariness of an act—the "responsibility" element—that is a mental pre-condition to punishment.¹⁰ Mental elements or conditions precedent to criminal "responsibility" are, in law, supposed to be a bright-line division between offenders whom we call guilty (who are then held to account and receive condemnation, pain and punishment for their transgressions) and those for whom we make various sanity declarations (who are relieved of responsibility and receive compassion, treatment and care). Except in rare instances, these elements are not very clear, and instead have become at once both a device for avoiding punishment and a uselessly unscientific test for those who truly need help. They also reveal the ill-will and hatred that is a dark secret at the heart of our sentencing philosophy.

Why do we even have legal tests for insanity?¹¹ Is it to make sure the offender is capable of profiting from a sentence? Unfortunately, it is not. Our rationale for having these tests confirms that

8. Rather than use gender-neutral terminology, I have used the masculine because over 90% of those convicted of violent offenses are males. Kristen S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 249 (1994); Deborah W. Denno, *Gender Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY, 80, 86 & nn.21-22 (1944); Eric W. Orts, *Simple Rules and the Perils of Reductionist Legal Thought*, 75 B.U. L. REV. 1441, 1457 n.76 (1995) (reviewing RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995)).

9. See *Morissette v. United States*, 342 U.S. 246, 249-52 (1952) (explaining, generally, importance of intent as element of crime).

10. Another such legally incapacitating condition is age. Juveniles are usually not found guilty—instead they are declared delinquent. Again, the rationale is responsibility. The juvenile is not considered to be fully, legally responsible for his or her acts. Hence, like insanity for the adult, age often provides the juvenile a defense to culpability. One must say "often," because public outrage over certain heinous acts performed by juveniles, may sometimes cause prosecutors to prosecute the juveniles as adults. The motivation again, usually is the public's desire for revenge, which overcomes the sympathy otherwise felt for children.

11. "Insanity," whatever that term means, originally served to define a whole range of psychological and organic mental disorders and socially deviant behaviors. The term has now disappeared from our scientific vocabulary, replaced by a myriad of descriptive terms used to qualify the various forms of mental illnesses and behaviors. The word insanity anachronistically survives in our legal vocabulary, notwithstanding the fact that this construct has no medical counterpart. It is defined in law by various *circuli in probandi* and legal mumbo-jumbo, typical of which is "that degree or quantity of mental disorder which relieves one of the

we are involved in sentencing with the most base of penal theories. Four main philosophical rationalizations justify our punitive sentencing: deterrence, containment, rehabilitation and retribution.

Deterrence is coercion by fear.¹² Apologists for the general deterrence theory argue that by sentencing one person we will by example cause others who would not otherwise do so to behave.¹³ Under this theory, however, punishment of the mentally disabled offender is justifiable because it will still influence others to refrain from similar activity. Likewise, it would be irrelevant that the punishment did not affect the insane offender's behavior because punishing insane offenders would have positive consequences overall as a result of the exemplary effects on other persons.

Under specific deterrence theory, a sentence is rationalized by its effect on the offender actually being sentenced and its goal of deterring him from committing other crimes.¹⁴ With respect to the mentally impaired, however, it is now apparent that even the simplest minds are capable of feeling fear. Research reveals that individuals, wherever they lie upon the mental continuum, can think in some degree for themselves and learn lessons, in differing degrees, from experience.¹⁵ A study by the Royal Commission on Capital Punishment regarding the mentally disabled and the law reveals that "the great majority of the patients in mental hospitals, even among the grossly insane [and the psychotic], know what [conduct] is forbidden by the rules [of the hospital] and that . . . [breach of these rules may result in the] forfeit[ure of] some privi-

criminal responsibility for his actions." *Sollars v. State*, 316 P.2d 917, 919 (Nev. 1957).

12. Nygaard, *supra* note 5, at 253; see Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 731 n.127 (1937) (noting that deterrence is "coercing an individual to refrain from the behavior in question because of his fear of the unattractive legal consequences").

13. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 24 (2d ed. 1986) (noting general deterrence theorizes that "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate"); see also FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 72-73 (1973) (noting difference between general and special [specific] deterrence).

14. See 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 3, at 16 (15th ed. 1993) (stating that specific deterrence "is aimed only at the individual offender" and that as result of punishment "he will refrain from crime in the future . . . to avoid further unpleasantness").

15. See GERTRUDE A. BARBER, *SHELTERED EMPLOYMENT WORK EXPERIENCE PROGRAM* (1975) (announcing much copied concept of "sheltered workshop" for mentally retarded, based on premise that everyone is capable of some productive endeavor); see also Richard Lowell Nygaard, *Is Prison An Appropriate Response to Crime?*, 40 ST. LOUIS U. L.J. 677, 686 (1996) (discussing Dr. Barber's "universally successful theory" of "sheltered workshops").

lege,”¹⁶ and hence, could theoretically be deterred. Under close scrutiny, it becomes apparent that deterrence theories do not really drive punishment in America. Deterrence is the reason most given for punishing offenders, but it is, more than anything else, an excuse. We simply know too little about what deters crime, and what it is about the process of detection, trial and punishment that deters. Indeed, it may not be the punishment at all, but rather, the collateral effects of the entire process that cause one to modify one's own behavior.

As rationalized by the “containment” theory, we incarcerate offenders to prevent them from committing other crimes.¹⁷ Containment, however, would work in substantially the same way on all offenders regardless of their mental capacity. As such, containment cannot be relied upon to account for our decisions regarding whether to punish (criminals) or treat (the mentally deficient) as a justification for sentencing them differently.

That rehabilitation would result from our system of punishment is a myth that has been largely abandoned as a philosophical justification for sentencing—at least as it is now, when the sentence is intended as a form of punishment which is executed by imprisonment.¹⁸ If one is reformed in prison it is because he reached down inside himself, found something he did not like and changed it. Offenders change in spite of prison, not because of it. Indeed, I cannot imagine a worse place to recover from a lapse of morals than prison.

I submit that under the first three penological theories, the mental capacity of the offender is completely irrelevant. Only

16. ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-53 REPORT 103 (1953) [hereinafter CAPITAL PUNISHMENT].

17. See Richard Lowell Nygaard, *The Myth of Punishment: Is American Penology Ready for the 21st Century?*, 5 REGENT U. L. REV. 1, 6 n.18 (1995) (discussing “containment” theory as device to protect society by containing criminals within walls of prisons and mental hospitals). “Containment” theory is also commonly known as “incapacitation” or “restraint” theory. See, e.g., LAFAYE & SCOTT, *supra* note 13, at 23 (noting premise behind incapacitation and restraint theories “is that society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society”). For a compilation of articles that discuss incapacitation, see DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Alfred Blumstein et al. eds., 1978).

18. See TORCIA, *supra* note 14, at 18 (stating that rehabilitation does not “attempt to intimidate [i.e., punish] the offender” but rather to “instill[] . . . the proper values and attitudes, by bolstering his respect for self and institutions”); see also LAFAYE & SCOTT, *supra* note 13, at 24 (noting that it is incorrect to call rehabilitation punishment because “the emphasis is away from making him suffer and in the direction of making his life better and more pleasant”).

under the retributivist theory does it matter if the offender is mentally, biologically or emotionally impaired, or wholly rational. Retribution is for the punisher, not the punished: Americans punish their offenders because they are mad and want to "get even."¹⁹ And, simply put, our humanitarian concerns do not permit us to pay back, get mad at, or "get even" with, a mentally disabled person who draws sympathy and understanding, rather than anger and hatred, from us. So, one who may be truly dangerous but who falls short of our unscientific and artificial criterion is deemed by our legal standard to lack the necessary state of mind to permit us to consider him "guilty" and subject him to our punitive sentencing measures.²⁰

We say that we are punishing an offender based upon the offense he committed. We are disingenuous, however, when we claim that the "punishment fit the crime." Serious penologists cannot make such assertions without crossing their fingers behind their backs. First, we have neither theoretical nor empirical data to support any sort of "fit." Second, if the punishment were to fit the crime, as opposed to the individual, it would not matter whom we are punishing—mentally responsible or otherwise—so long as this individual actually performed the prohibited act.

I disagree fundamentally with the concept of proportionality enunciated by the Supreme Court in *Solem v. Helm*,²¹ a case supporting a concept that parrots what numerous penologists have suggested, and which is still followed by various state courts.²² Proportionality is a necessary premise to define the outer limits of

19. See LOIS FORER, A RAGE TO PUNISH 101 (1994) (stating that of those surveyed by Media General Poll in 1984 favoring death penalty, reason cited by most of those people was desire for vengeance). "Killing by government no longer evokes a sense of revulsion in many law-abiding Americans who roundly denounce crime and violence. Vengeance as an appropriate response to wrongdoing is no longer shunned. It has become respectable." *Id.*

20. LAFAYE & SCOTT, *supra* note 13, at 304 (noting that purpose of insanity defense "is . . . said to be that of separating out from the criminal justice system those who should only be subjected to a medical-custodial disposition" as opposed to full penal sanctions).

21. 463 U.S. 277 (1983), *overruled by* Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

22. See *id.* at 290 (holding that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted"). The Supreme Court instructed future courts to determine the proportionality of a sentence by looking at objective criteria consisting of three components. *Id.* at 292. First, a court should examine the gravity of the offense and the harshness of the penalty. *Id.* Second, a court should evaluate the sentence in question in light of those sentences imposed in the same jurisdiction for more serious crimes. *Id.* Finally, a court should compare the sentence in question with those imposed for the same offense in other jurisdictions. *Id.*

penal pain. Yet, it answers few other deficiencies in the system. Indeed, we have flipped reasoning on its back and have made proportionality the reason-in-fact for the sentence—that is to say, we want to make sure the criminal gets his full share of pain for what he did. Proportionality confirms that punishment is driven by what one has done and by a social desire for retribution. Society is angry, and the conviction of an offender provides it with a forum in which to express both its odium for the *act* and an opportunity to express its support for the law and the law-abiding. This permits citizens to vent their aggressions in an officially legitimated and socially acceptable forum upon persons for whom few really care—criminals—and as a result, to feel they have “done something” to fight crime.

Nonetheless, by providing this “sane/insane” mental “loop-hole” for some offenders, and for some crimes, American sentencing policy tacitly acknowledges that which it otherwise tries to deny: Individuals are truly different and should be treated differently.²³

In *Harmelin*, Justice Scalia, joined by Chief Justice Rehnquist, rejected the Court's holding in *Solem* as it applied to the proportionality theory, when he expressly stated that “*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.” *Harmelin*, 501 U.S. at 965. While three other justices had joined Justice Scalia's opinion that the defendant in *Harmelin* had not received a sentence that constituted cruel and unusual punishment, they refused to join Justice Scalia's rejection of a proportionality concept. *See id.* at 997 (Kennedy, J., concurring) (stating that Eighth Amendment “encompasses a narrow proportionality principle”). Justice Kennedy, joined by Justice O'Connor and Justice Souter, stated that although the contours of a proportionality principle may not be as broad as those alluded to in *Solem*, the principle should continue to be a part of Eighth Amendment analysis in the form of a gross disproportionality standard. *Id.* at 998-1001 (Kennedy, J., concurring). Four members of the Court, Justice White, Justice Blackmun, Justice Marshall and Justice Stevens, stated that they would not restrict *Solem*'s proportionality analysis at all. *Id.* at 1009-27 (White, J., dissenting). Although the Supreme Court has tried to shy away from application of the proportionality standard as it was applied in *Solem*, several state and federal courts have continued to use a proportionality standard, at least the gross disproportionality standard advocated by Justice Kennedy in *Harmelin*. *See generally* United States v. Certain Real Property & Premises Known as 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir. 1992) (applying proportionality standard advocated by Court in *Solem*); United States v. Gordon, 953 F.2d 1106 (8th Cir. 1992) (conducting review based on Justice Kennedy's gross disproportionality standard discussed in *Harmelin*); United States v. McLean, 951 F.2d 1300, 1303 (D.C. Cir. 1991) (“Eighth Amendment's proportionality principle applies to noncapital sentences [as well as to capital offenses]”); State v. Bartlett, 830 P.2d 823 (Ariz. 1992) (concluding that *Solem* survives *Harmelin*); Wingett v. State, 640 N.E.2d 372 (Ind. 1994) (upholding application of *Solem* proportionality standard); Speer v. State, 890 S.W.2d 87 (Tex. Crim. App. 1994) (applying *Solem* when reviewing constitutionality of sentencing statute); State v. Lewis, 447 S.E.2d 570 (W. Va. 1994) (same).

23. HANS TOCH & KENNETH ADAMS, *THE DISTURBED VIOLENT OFFENDER* 162 & n.7 (1994).

Seymour Halleck has observed:

It is just that we move around the fulcrum of this teeter-totter according to the vagaries of the individual trial and jury, and the persuasive ability of the experts who testify. Consequently, this most important decision becomes arbitrary and nearly meaningless to any form or forum for an accurate and scientific determination of mental capacity or impairment, the degree to which one's behavior is capable of being changed and the appropriate remedy for changing it. Is it not high time that we in penology abandon the unscientific concept that there is a line beyond which some individuals, the mentally or otherwise incompetent, lie? I think so. Rather, we should recognize that there is a continuum upon which all persons—you, I and all offenders—lie, each having our own deficiencies, diseases, predilections, actuators and environments that predispose some of us to culturally offensive behavior. Does not each offender need his own brand and degree of behavior modification before being released into society again? Again, I think so.

Far removed from a scientific determination of who is responsible and required to bear the full brunt of prison and retribution, mental condition has become a battleground in the adversarial culpability process in which we have totally lost sight of the preliminary notions of criminal law: safety and behavioral control. Is it even useful, when deciding upon guilt, to speak in terms of sanity or mental illness? Given our tests, it is not. Mental health cannot be divided into two categories—one for the fully rational and one for the totally irrational. I suggest it is improper to fashion criminal law on such a simplistic, nonscientific distinction. The mental or emotional component of behavior is far too complex. Mental health services are now a significant part of most hospitals' programs and, indeed, of many services now provided to employees. A President's Commission on Mental Health found that at any given time, one-fourth of all American citizens suffer from some form of

[I]n our current political climate, pressure is actually growing to avoid examining psychological issues related to culpability by narrowing the insanity defense or doing away with practices associated with the diminished capacity doctrine. . . . By providing a loophole for dealing with the worst possible cases [those in which the offender faces heavy penalties], the insanity defense allows society to acknowledge that at least some offenders are different. This enables society to avoid the formidable problems that would arise if it were to adopt a more flexible approach in assessing the relationship of psychological disability to liability in the case of all offenders.

SEYMOUR L. HALLECK, *THE MENTALLY DISORDERED OFFENDER* 61 (1986).

serious emotional distress.²⁴ One psychologist from the National Institute of Health has said that almost no family is free of some form of mental disorder.²⁵ Perhaps none of us is. As Lady Wootton points out:

Nature knows only infinite gradations in both the physical and the mental differences between members of the human species, and it is even probable that not only does one individual's responsibility for his actions differ from that of another, but that the sense of responsibility in the same individual may also vary from time to time.²⁶

It is, no doubt, a great simplification to say that not all mental defectives are criminals and, correspondingly, that not all criminals are mentally defective. Although it is true that those who break the law are often "psychologically atypical,"²⁷ offenders are different from the law-abiding by the presence or absence of other shared characteristics. Some people, mentally sound or not, are neither sufficiently inhibited by the law nor by a concern over consequences to refrain from performing anti-social acts. Others do not have sufficient social skills to cope with temptation or to resist acting out their aggression. Still others are pathologically incapable of remaining within the cultural bounds set by our civilization. It is to this last category that I now direct your attention.

The main test for what was (and unfortunately in law still is) called insanity, comes from the famous *M'Naghten* rule announced in 1843 by the House of Lords in *M'Naghten's Case*.²⁸ In January of that year, Daniel M'Naghten shot and killed Edward Drummond,

24. PRESIDENT'S COMM'N ON MENTAL HEALTH, II REPORT TO THE PRESIDENT FROM THE PRESIDENT'S COMM'N ON MENTAL HEALTH 27 (1978) (Report of the Task Panel on Mental Health).

25. ALVIN TOFFLER, *THE THIRD WAVE* 365-66 (1980) (citing MARTIN L. GROSS, *THE PSYCHOLOGICAL SOCIETY* 6 (1978)).

26. BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST* 91 (2d ed. 1981).

27. See JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 173 (1985) (noting that "populations of offenders differ statistically in various respects from populations of nonoffenders").

28. 8 Eng. Rep. 718 (H.L. 1843). The Anglo-American tradition of relieving one of criminal culpability for this amorphous group of mentally disabled persons by reason of "madness" or "insanity" stems from developments during the reign of Edward III (1326-1377). JOHN BIGGS, JR., *THE GUILTY MIND* 83 (1955). Criminal laws are premised on the notion that all are capable of free and rational choice between alternative modes of behavior, and that those who "choose" to commit crimes are blameworthy. Unfortunately, by using this simplistic formula and by dividing the offenders into blameworthy/not blameworthy, we lose sight of the myriad of actuators that may come into play in any behavioral decision. For a thorough discussion of *M'Naghten's Case* and its ramifications on English law, see

who served as private secretary to the British Prime Minister, Sir Robert Peel.²⁹ M'Naghten shot Drummond in broad daylight and in the presence of a policeman.³⁰ Investigators reported that M'Naghten thought he was shooting the Prime Minister, whom M'Naghten deluded was tormenting him.³¹

English common law had a tradition of taking an offender's mental state into account when deciding upon one's culpability for a crime.³² It held that one could only be punished for an offense committed with a "guilty mind."³³ Children, the mentally retarded

RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN (1981).

29. *M'Naghten's Case*, 8 Eng. Rep. at 719.

30. MORAN, *supra* note 28, at 7 (quoting contemporaneous *London Times* account of incident in 1843). M'Naghten approached Drummond from behind "in the open street, and in the broad face of day." *Id.* M'Naghten shot Drummond in the back with one gun and prepared to shoot him again with a second gun when a policeman, who had witnessed the event, seized him. *Id.* The second gun discharged in the struggle and, luckily, the bullet did not find a victim. *Id.*

31. BIGGS, *supra* note 28, at 98 (noting that when asked by police inspector if he knew who he had shot, M'Naghten replied, "Yes—Sir Robert Peel"). M'Naghten believed that Sir Robert Peel, the Prime Minister and leader of the Tory Party, was heading a conspiracy to persecute him. MORAN, *supra* note 28, at 10. M'Naghten's only public statement lucidly describes the delusion under which he was operating:

The Tories in my native city have compelled me to do this. They follow, persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, into Scotland, and all over England. In fact, they follow me wherever I go. I cannot sleep nor get no rest from them in consequence of the course they pursue towards me. I believe they have driven me into a consumption. I am sure I shall never be the man I was. I used to have good health and strength but I have not now. They have accused me of crimes of which I am not guilty, they do everything in their power to harass and persecute me; in fact, they wish to murder me. It can be proved by evidence. That's all I have to say.

Id.

32. For a discussion of insanity under English common law, see BIGGS, *supra* note 28, at 81-110; 1 NIGEL WALKER, CRIME AND INSANITY IN ENGLAND (1968); F.A. WHITLOCK, CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS 12-34 (1963); Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CAL. L. REV. 105 (1924). Early English common law allowed insanity as a defense to common law felonies. Crotty, *supra*, at 110-11. The policy for allowing the defense was that a felony required *mens rea*, and an insane person did not have the capacity to have the requisite *mens rea* and thus, could not be punished. *Id.* A lunatic, it was said, "is punished by his madness alone." *Id.* at 110.

33. See BIGGS, *supra* note 28, at 81 (noting requirement of "guilty mind" or *mens rea* at English common law); Crotty, *supra* note 32, at 110-11 (noting that English common law required *mens rea*); see also WHITLOCK, *supra* note 32, at 55:

"For some centuries, English law . . . has made liability to punishment for serious crime depend, not only on the accused doing the outward acts which the law forbids, but on his having done them in certain conditions which may broadly be termed mental . . . [which] are commonly, though rather misleadingly, referred to by lawyers as *mens rea*."

and insane persons were generally not held criminally liable under English common law.³⁴

Because it appeared that M'Naghten was surely insane, and there was no great enthusiasm for punishing him, the primary object of the trial seemed to be that of establishing a connection between M'Naghten's insanity and the shooting.³⁵ This was easily done, and M'Naghten was sentenced to spend the rest of his life in an insane asylum.³⁶

That, however, was not the end of the case. The Queen was dissatisfied with the verdict and, following review, the fifteen judges of the English common law courts developed their tradition into a legal doctrine defining the bounds of the mental abnormality defense to a criminal prosecution.³⁷ This doctrine sets forth three conditions for a successful insanity defense: (1) the accused must have suffered from a defect of reason at the time he committed his

Id. (quoting H.L.A. HART, PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY 20 (1961)).

34. See *Penry v. Lynaugh*, 492 U.S. 302, 331-32 (1989) (noting English common law prohibition against punishing "lunatics" and "idiots"); Sheila L. Sanders, *The Imposition of Capital Punishment on Juvenile Offenders: Drawing the Line*, 19 S.U. L. REV. 141, 144 (1992) ("Under English Common Law, children under the age of seven could not be charge[d] with a crime in criminal court."); Lawrence A. Vonnore, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 769 n.67 (1986) (noting under English common law that children under age of seven were not held criminally responsible for their acts); see also Crotty, *supra* note 32, at 113 (stating that early treatises on English common law held that "[children] under the age of discretion, ideots and lunaticks, are not punishable by any criminal prosecution whatsoever").

35. See BIGGS, *supra* note 28, at 95-103 (discussing trial of M'Naghten and issue of insanity). Nine expert witnesses testified on M'Naghten's behalf that he was insane at the time of the shooting, including, indirectly, Dr. Isaac Ray, whose just-published book on insanity and the law was presented at trial as relevant authority on the issue. *Id.* at 100-01. Before introducing the contents of Ray's book on M'Naghten's behalf, counsel for M'Naghten held the book in the air, exclaiming, "I hold in my hand perhaps the most scientific treatise that the age has produced upon the subject of insanity in relation to jurisprudence." *Id.* at 100. The expert testimony was so convincing as to M'Naghten's insanity that the judges cut the trial short and promptly submitted the question of M'Naghten's sanity to the jury. *Id.* at 101-02.

36. See *id.* at 102 (noting that jury returned verdict of not guilty by reason of insanity and M'Naghten was removed to state hospital where he resided until his death in 1865).

37. *Id.* at 103. The verdict in M'Naghten's trial received sharp criticism in England. *Id.* at 102-03. Newspaper editorials claimed M'Naghten had been "profitably insane," feigning insanity to escape punishment. *Id.* Others criticized the court for being too lenient and even naive. *Id.* at 102. The Queen entered the fray by writing a letter to the Prime Minister (who was, coincidentally, the intended target of M'Naghten's bullet) that criticized the *M'Naghten's Case* verdict. *Id.* at 103. The Queen's letter prompted the House of Lords to consider the parameters of the insanity defense by reviewing the M'Naghten verdict. *Id.*

act; (2) the defect must result from a disease of the mind; and (3) as a result of this defect the accused did not know what he was doing, or if he knew what he was doing, did not know that it was wrong.³⁸

That the test even survived is amazing. It was quickly denounced, primarily because it failed to take into account the myriad of other reasons why one may breach the rules, knowing them to be injunctions but having insufficient ability to resist breaching them.³⁹ With the focus only upon punishment, even early critics

38. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (H.L. 1843). Lord Chief Justice Tindal formulated what would become known as the *M'Naghten* test as follows:

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Id. Courts and criminologists have struggled since to decide whether this means "moral" or "legal" wrong. See Herbert Fingarette, *Disabilities of Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236, 255 n.49 (1976) (noting confusion caused by ambiguity over whether defendant must know act was "morally" or "legally" wrong); see also BIGGS, *supra* note 28, at 108 (noting ambiguity in *M'Naghten's Case* use of term "wrong," which can be interpreted as meaning either "legally" or "morally" wrong); LAFAVE & SCOTT, *supra* note 13, at 315-16 (discussing distinction between "morally" and "legally" wrong). Some courts have taken the view that a defendant must simply not know that the act performed was "morally" wrong. See, e.g., *People v. Schmidt*, 110 N.E. 945, 946 (N.Y. 1915) (holding defendant was not liable for acts committed when he was unable to distinguish between right and wrong in moral sense). Other courts have required that a defendant not know that the act was "legally" wrong. E.g., *State v. Hamann*, 285 N.W.2d 180, 183 (Iowa 1979) ("The test is not how much law a person claiming an insanity defense actually knows. The determination is to be made on the basis of a person's ability to understand it when something is prohibited by law."); *State v. Crenshaw*, 659 P.2d 488, 492 (Wash. 1983) (requiring that defendant not know that act was "contrary to the law"). This latter view is clearly the view in England, where *M'Naghten's Case* is now interpreted to require that a defendant must lack the knowledge that the act was "legally" wrong. See, e.g., *Regina v. Windle*, 2 Q.B. 826, 834 (1952) (ruling that defendant must not know act was "legally" wrong in order to validly claim insanity defense).

The significance of this distinction between "morally" wrong and "legally" wrong is best illustrated by a classic hypothetical. If A kills B, knowing that he is killing B, and knowing that it is illegal to kill B, but under an insane delusion that God has commanded him to kill B because the salvation of the human race depends upon A killing B, then A is guilty if the word "wrong" is taken in its legal sense, but A is "not guilty by reason of insanity" if "wrong" is understood in its moral sense. 2 SIR JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 149 (1883).

39. See generally WHITLOCK, *supra* note 32, at 35 (stating that "[f]rom their inception the [*M'Naghten*] Rules have been subjected to constant criticism from both legal and medical commentators," and discussing common criticisms). The Royal Commission on Capital Punishment summarized criticism of the *M'Naghten* rules as follows:

[T]he *M'Naghten* test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or pri-

decried how in a civilized system we could punish others who, although not mentally deficient, *could not* have obeyed the rules.⁴⁰ Moreover, applied literally the rule required total incapacitation of the offender's cognitive faculty to escape responsibility and punishment. The offender simply must not have been able to "know." This is an unworkable, intellectually dishonest and scientifically absurd rule.

One year later, in *Commonwealth v. Rogers*,⁴¹ a Massachusetts judge expanded the doctrine to include some who were able to distinguish right from wrong.⁴² He instructed his jurors that they could acquit the accused if the mental disease "overwhelmed the [defendant's] reason, conscience and judgment," and if the jurors found that he was acting "from an irresistible and uncontrollable impulse."⁴³ In 1859, the courts added another wrinkle to the "responsibility" fabric, when a jury acquitted United States Congressman Daniel Sickles⁴⁴ of killing his wife's paramour, finding Sickles to be suffering from "temporary insanity."⁴⁵ Over time, other modi-

marily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease.

CAPITAL PUNISHMENT, *supra* note 16, at 80; see also SAMUEL J. BRAKEL & RONALD S. ROCK, *THE MENTALLY DISABLED AND THE LAW* 386 (1971) (noting that "[s]ince their promulgation the M'Naghten rules have been subjected to a constant stream of criticism").

40. LAFAYE & SCOTT, *supra* note 13, at 318 (stating that some commentators criticize *M'Naghten's Case* "because it only takes account of impairment of cognition and ignores impairment of volitional capacity").

41. 48 Mass. (7 Met.) 500 (1844).

42. *Id.* at 500-02. In *Rogers*, the defendant was a convict who had killed a prison warden by stabbing him in the neck with a knife. *Id.* at 501. The defendant claimed he had been insane at the time of the act, and extensive expert testimony was introduced on the matter. *Id.* The judge instructed the jury that if it found that "the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment" and that the defendant "in committing the homicide, acted from an irresistible and uncontrollable impulse," then the defendant's "act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it." *Id.* at 502.

43. *Id.*; see WILSON & HERRNSTEIN, *supra* note 27, at 504 (noting that this "'irresistible impulse' [instruction] was a way of broadening the range of mental disease that could excuse an offender, adding a defect in volition to the purely cognitive defects allowed by the M'Naghten test").

44. For the transcript of the Sickles trial, see *The Trial of Daniel E. Sickles for the Murder of Philip Barton Key*, 12 AM. ST. TRIALS 494 (1859) [hereinafter *Trial of Daniel E. Sickles*].

45. *Trial of Daniel E. Sickles*, *supra* note 44, at 760-62. The trial of Sickles involved a sensational case that became known as the "Sickles-Key Affair." Sickles was a Congressman in Washington, D.C., who had become friendly with Philip Barton Key, a United States Attorney who was also the son of Francis Scott Key, the

fications were proposed to this largely unworkable doctrine of responsibility to make it malleable to the facts of the more troublesome cases. But as with all rules of law, this one did not change quickly. Indeed, when one considers the tremendous advances made in the fields of medicine, psychiatry, psychology and sociology in the past 150 years, one must conclude that the law virtually has stood still.

The next significant change came in 1871, when the New Hampshire Supreme Court rejected the *M'Naghten* rule as inadequate in *State v. Jones*.⁴⁶ The court promulgated a new rule: "[T]he verdict should be 'not guilty by reason of insanity' if the killing was the offspring or product of mental disease in the defendant."⁴⁷ This formulation did not attract attention until 1954 in the case of *Durham v. United States*.⁴⁸ In *Durham*, the United States Court of Appeals for the District of Columbia Circuit repudiated *M'Naghten*'s "nature" and "illegality" knowledge schemes, which Justice Frank-

author of the "Star Spangled Banner." *Judicial Conference—Second Circuit*, 153 F.R.D. 375, 439 (1992). Sickles had aided Key in his reappointment as a United States Attorney. *Id.* Unbeknownst to Sickles, Key was having an affair with Sickles's wife, Theresa. *Id.* Key would come to the Sickles house waving a white handkerchief, signaling to Theresa that it was time for a rendezvous. *Id.* When Sickles somehow became aware of the affair, he waited for Key to arrive, and upon the wave of the handkerchief Sickles emerged from his home and gunned Key down. *Id.* At trial, Sickles advanced the defense of temporary insanity. Allen D. Spiegel & Peter B. Suskind, *A Paroxysmal Insanity Plea in an 1865 Murder Trial*, 16 J. LEGAL MED. 585, 591 (1995). It appears from the acquittal that the jury accepted Sickles's claim that he had been overcome by an irresistible and uncontrollable impulse and had been temporarily insane when he shot Key, notwithstanding his uncontested premeditation. *Id.*

46. 50 N.H. 369 (1871).

47. *Id.* at 398. The defendant in *Jones* killed his wife after learning of her infidelity. *Id.* at 372. The court reasoned that "[i]f the defendant had an insane impulse to kill his wife, which he could not control, then mental disease produced the act. If he could have controlled it, then his will must have assented to the act, and it was not caused by disease, but by the concurrence of his will, and was therefore a crime." *Id.* at 399.

48. 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). The court in *Durham* adopted the "product" approach originally enunciated by the New Hampshire court in *New Hampshire v. Jones*, 50 N.H. 369, 398 (1871). *Durham*, 214 F.2d at 874-75 n.48. In *Durham*, the defendant had a long history of mental illness and was appealing his conviction for house-breaking, claiming that the test for criminal responsibility applied at his trial was obsolete. *Id.* at 864-65. The court found that the *M'Naghten* "right-wrong" test, even when supplemented by the "irresistible impulse" test, was inadequate because it was too narrow. *Id.* at 871-74. Instead, the court adopted the approach in *Jones*, and held that a person "is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75 (emphasis added). In 1972, however, the same court overruled its holding in *Durham* and adopted in its place the Model Penal Code approach to determining criminal responsibility. *Brawner*, 471 F.2d at 973. For the Model Penal Code's approach to criminal responsibility, see *infra* note 51 and accompanying text.

further had labeled "in large measure shams."⁴⁹ Under the *Durham* "product" test, an offender would not be held responsible if his act, while otherwise criminal, "was the product of mental disease or mental defect."⁵⁰ Hence, relevant inquiry under *Durham* is directed toward medically informed concepts of mental health rather than lay conjecture as to the defendant's total incapacity to make moral judgments.

Later, the Model Penal Code recommended further practical revisions to the rule of responsibility. According to the Code: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."⁵¹

In *United States v. Currens*,⁵² the United States Court of Appeals for the Third Circuit announced a formula for describing criminal responsibility that rejected the approaches taken by the courts in *M'Naghten* and *Durham*.⁵³ There we said: "The jury must be satisfied

49. HENRY WEIHOFFEN, *THE URGE TO PUNISH: NEW APPROACHES TO THE PROBLEM OF MENTAL IRRESPONSIBILITY FOR CRIME* 61 (1956).

50. *Durham*, 214 F.2d at 875. For a discussion of the "product" test adopted in *Durham*, see LAFAVE & SCOTT, *supra* note 13, at 286-92 (discussing workings and elements of *Durham* test); Edward de Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 342-48 (1955) (same); William O. Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485, 488-95 (1956) (discussing *Durham* from psychiatrists' point of view); Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 368-76 (1955) (criticizing *Durham* test).

51. MODEL PENAL CODE § 4.01 (1985). For a discussion of the Model Penal Code approach, see LAFAVE & SCOTT, *supra* note 13, at 292-95. The most significant difference between the Model Penal Code approach and the *M'Naghten* and "irresistible impulse" tests is that the Model Penal Code presents a much less rigid threshold, requiring merely a lack of substantial capacity to understand that the act is illegal or to conform to the requirements of the law. LAFAVE & SCOTT, *supra* note 13, at 330. A number of courts of appeal have adopted some variation of the Model Penal Code approach. See, e.g., *Browner*, 471 F.2d at 973 (overruling *Durham* and adopting Model Penal Code rule while supplying its own definition of "mental disease or defect"); *United States v. Smith*, 404 F.2d 720, 727 (6th Cir. 1968) (leaving duty of determining precise wording of jury instruction to trial court, but requiring that three questions based on Model Penal Code be answered); *United States v. Chandler*, 393 F.2d 920, 926 (4th Cir. 1969) (praising Model Penal Code formulation but refusing to require any uniform instruction); *Wion v. United States*, 325 F.2d 420, 430 (10th Cir. 1963) (adopting essential elements of Model Penal Code formulation).

52. 290 F.2d 751 (3d Cir. 1961).

53. *Id.* at 774. We criticized both tests as being too rigid for assuming that the mind "can be broken up into compartments, one part sane and the other insane," instead of "determining the total mental condition of the defendant at the time he committed the [criminal] act." *Id.*

In *Currens*, the defendant stole a car in Ohio and abandoned it at the airport in Pittsburgh, Pennsylvania. *Id.* at 752. In his confession, Currens told the FBI

that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.”⁵⁴ Otherwise, the defendant must be found to possess the guilty mind necessary to constitute his or her prohibited act a crime.⁵⁵ In creating a new formula for the circuit’s

that he was not sure where he had left the car, and suggested that he may have driven it in New York City. *Id.* When interviewed by an FBI agent two weeks later, Currrens could barely recall his prior statement to the FBI. *Id.* Dr. Maurice Bowers, a Pittsburgh neuropsychiatrist, testified that Currrens had acted without due regard for the consequences of his criminal behavior, and that his illegal and anti-social conduct was a repetitive outgrowth of his personality. *Id.* at 756. Dr. Bowers stated that Currrens had a “sociopathic personality” with a schizophrenic tendency and thus, could not be considered a “mentally healthy person.” *Id.* Dr. Bowers considered a sociopathic personality to constitute mental illness but not, in the legal sense, insanity. *Id.*

The court charged the jury with instructions based on the *M’Naghten* rules, while Currrens’s counsel had requested, in addition, a jury charge that incorporated the *Durham* “product” test, which the court refused to apply. *Id.* at 757-58. The jury returned a guilty verdict. *Id.* at 758. Currrens appealed and asserted that the proper jury instructions would have been ones that referenced the *Durham* formula. *Id.*

54. *Id.* at 774. We stated that we had created our test by incorporating language from the test proposed by the American Law Institute in its Model Penal Code and the test suggested by the Royal Commission on Capital Punishment. *Id.* at n.32. Although we approved of portions of the Model Penal Code provision, we were uncomfortable with the phrase “to appreciate the criminality of his conduct.” *Id.* (quoting MODEL PENAL CODE § 4.01 (Proposed Final Draft No.1, 1961)). We believed that such a “phrase would overemphasize the cognitive element in criminal responsibility and thus distract the jury from the crucial issues while being little more than surplusage.” *Id.* For the text of the Model Penal Code provision to which we alluded in *Currrens*, see *supra* note 51 and accompanying text.

We were certainly more comfortable with part (c) of the test developed by the Royal Commission on Capital Punishment, which stated that “[t]he jury must be satisfied that, at the time of committing the act, the accused, as a result of the disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it.” *Currrens*, 290 F.2d at 774 n.32 (quoting CAPITAL PUNISHMENT, *supra* note 16, cmt. 8932, at 110-11, 117-18). In *Currrens*, we rejected parts (a) and (b) of the report of the Royal Commission because those parts paralleled the *M’Naghten* rules. *Id.*

55. *Currrens*, 290 F.2d at 775. In *Currrens*, we considered an acceptable jury instruction to be:

If you the jury believe beyond a reasonable doubt that the defendant, Currrens, was not suffering from a disease of the mind at the time he committed the criminal act charged, you may find him guilty. If you believe that he was suffering from a disease of the mind, but believe beyond a reasonable doubt that at the time he committed the criminal conduct with which he is charged he possessed substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated you may find him guilty. Unless you believe beyond a reasonable doubt that Currrens was not suffering from a disease of the mind or that despite that disease he possessed substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated you must find him not guilty by reason of insanity. Thus, your task would

courts, our opinion in *Currens* expressly criticized the doctrines set forth in *M'Naghten* and *Durham*.⁵⁶ We stated that the *M'Naghten* and *Durham* doctrines were inappropriate because they were premised on the theory that the mental illness of an insane person causes him to commit the criminal act,⁵⁷ and held that a court should consider that because of his illness, the defendant has lost the capacity to control his acts in the ways a normal person controls them.⁵⁸ In *Currens*, we concluded that if a defendant has lost the ability to con-

not be completed upon finding, if you did find, that the accused suffered from a disease of the mind. He would still be responsible for his unlawful act if you found beyond a reasonable doubt that at the time he committed that act, the disease had not so weakened his capacity to conform his conduct to the requirements of the law which he is alleged to have violated that he lacked substantial capacity to conform his conduct to the requirements of that law. These questions must be determined by you from the facts which you find to be fairly deducible from the evidence in this case.

Id.

56. *Id.* at 773-74. We considered the *M'Naghten* rules to be unfair to the individual defendant and dangerous to society. *Id.* at 767. We opined that a test based on knowledge of right and wrong is essentially meaningless because many insane or mentally ill patients know the difference between right and wrong. *Id.* at 765. In addition, we noted:

"So long as the courts judge criminal responsibility by the test of knowledge of right and wrong, psychotics who have served prison terms or are granted probation are released to commit increasingly serious crimes, repeating crime and incarceration and release until murder is committed. Instead of being treated as are ordinary criminals, they should be confined to institutions for the insane at the first offense and not be released until or unless cured."

Id. at 767 (quoting BIGGS, *supra* note 28, at 144-45). We thus concluded that releasing an untreated and uncured mentally ill offender from jail and placing him back into the general public "presents a great and immediate danger." *Id.*

When analyzing the *Durham* "product" test, we opined that a test for criminal responsibility should incorporate the concept that "where there is a reasonable doubt as to whether a particular person possesses capacity . . . to conform his conduct to society's standards there is a reasonable doubt as to whether he possessed the necessary guilty mind." *Id.* at 773. We concluded that the *Durham* formula did not meet this requirement. *Id.* We interpreted the *Durham* formula as requiring proof that the act committed was not the *product* of mental disease or defect. *Id.* Thus, the *Durham* formula stresses a possible causal connection between the defendant's mental disease and his criminal act. *Id.* This suggests that the defendant's mental disease produces some acts but not others. *Id.* at 773-74. The formula, however, wrongly assumes that the mind can be broken up into a sane compartment and an insane compartment. *Id.* at 774. Therefore, we concluded in *Currens* that the *Durham* formula omitted the most important step in the adjudication of criminal responsibility: a determination of the total mental condition of the defendant at the time he committed the act, in order to provide the factfinder with the means to render an ultimate social and moral judgment. *Id.*

57. *Id.* Instead, the court should determine the "total" mental condition of the defendant at the time of the alleged crime. *Id.*

58. *Id.* Therefore, it is not the mental defect, but the "total personality" which, as a result of mental illness, is responsible for the lack of control. *Id.*

trol his actions because of a mental illness, he cannot possess the requisite *mens rea* to consider his act a crime.⁵⁹

All of these tests made important and needed changes to the rules of responsibility. Now, throughout the states, several variations on these main themes guide jurors in the critical decisions they must make with respect to a person's mental capacity. Although *Currens* comes closest, none of these tests confronts the reality that clear and definite rules are necessary for jurors who must decide these weighty issues, and such simplistic tests cannot account for the human psyche's myriad of variables nor for the offender who is defensively using these definitions as a strategy to escape punishment for his criminal acts.⁶⁰

In reality, mental condition and the psychological components of behavior are more liquid than solid. Moreover, none of these doctrines recognizes that trained professionals should be the ones who determine a defendant's mental capacity, not lay persons who must sift through masses of often incomprehensible, or at least uncomprehended, data to make life and death decisions.

A part of the problem is philosophical: We are content to rely upon the myth of punishment as the panacea for crime.⁶¹ This triggers a host of constitutional considerations that treatment does not. In reality, however, inflexible rules and myths can neither adequately educate jurors nor adequately differentiate between the varying personal motivations one might possess or actuate when committing a crime. Thus, it is the ambiguity of a mental test that would permit a court to transmute the test to fit each case—precisely that which rule-makers seek to eliminate—or would permit a court to simplify an otherwise incomprehensible explanation for a lay jury.

59. *Id.* Thus, a lack of volition becomes an inability to form specific intent and the insanity defense becomes not an affirmative defense, but rather, a negation of the prosecution's burden.

60. See, e.g., Edward Felsenthal, *Man's Genes Made Him Kill, His Lawyers Claim*, WALL ST. J., Nov. 15, 1994, at B1, B5 (reporting that confessed killer's lawyers argued that killer's genes may have predisposed him to commit crime). In 1993, Harvard University neuroscientists released a study identifying a particular gene mutation in an extended family in which men seemed unusually prone to violence. *Id.* at B1. I do not ridicule the possibility of genetic influence on behavior. Genetic discoveries, however, are further evidence that our binary "sane/not sane" culpability determination is obsolete. See also Nygaard, *supra* note 5, at 239 (noting "the genesis of crime is not a single issue").

61. See Nygaard, *supra* note 17, at 12 (concluding that myth of punishment is dangerous because urge to punish, although emotionally gratifying to some, ignores rational and constructive solutions to protect society).

With contemporary psychiatric and psychological data, the legitimate experts, who must testify about mental conditions, are unable to make accurate and scientific determinations fit into the rigid legal definitions the law imposes.⁶² Our current process systematically eliminates what is psychiatrically sound or psychologically workable, leaving us with a test for responsibility that may have no relationship at all to whether the offender needs help, punishment, confinement or a combination of all three. Moreover, it is my experience that contrary to the law, jurors filter out the law's jargon, and on the basis of their intuitive sense of justice simply decide whether, irrespective of expert advice and testimony, they think the offender is "nuts."

Trials in which a jury must decide upon the accused's guilt based upon the contradictory testimony of experts, result in "battles of experts" that virtually assure arbitrary outcomes.⁶³ With the freedom of the accused and the safety of society at stake, this is not good enough. I have urged, and continue to urge, that we abandon the myth of punishment as the *raison d'être* of the criminal trial.⁶⁴ We must begin to think of penology as an adaptable and multi-disciplinary process that can examine, accept and implement proposed solutions derived from scientific discoveries if those solutions will help us reach a realistic goal—in this instance, public safety.

The current practice of determining responsibility and state of mind as a predicate to culpability, however, is in great tension with science and practical reality. American penal theory was developed 200 years ago and reflected eighteenth century theories of mind-body dualism, with the mind or soul as the source of behavior.⁶⁵ It

62. See, e.g., Edwin I. Megargee, *Foreword to TOCH & ADAMS*, *supra* note 23, at xv (noting that "Toch and Adams' research demonstrates that offenders committing the same crime may differ greatly from one another with respect to the chronicity of their offending, the role, if any, played by substance abuse, the danger they pose to themselves and others, and their needs for mental health programming"). Megargee states that despite this research, legislators are increasingly eager to propose simplistic solutions, such as fixed mandatory sentences for a variety of offenses. *Id.*

63. As I used to advise my juries: "No one is smarter than one expert. No one is dumber than two."

64. See generally Nygaard, *supra* note 17, at 1-12 (commenting that philosophy of punishment to protect society will not prepare American penology for twenty-first century). America needs to discover causes and motives of crime as well as to rehabilitate criminals, rather than build more prisons. *Id.* at 12; cf. *United States v. Dunnigan*, 507 U.S. 87, 98 (1993) (noting that rehabilitation is no longer goal of sentencing under Federal Sentencing Guidelines).

65. See Nygaard, *supra* note 5, at 239-41 (discussing views of primary eighteenth century reformers of penology).

still does. Modern science, contrarily, is beginning to view the brain and the body more as a holistic biological system, that expresses itself within and with a complex social ecology.⁶⁶

66. See ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 3-14 (1994) (discussing case history of Phineas Gage, 25-year old construction foreman whose entire demeanor and personality changed when an explosion sent steel rod through front of his brain, exiting through top of his head). Phineas Gage, a five-foot-six athletically built man, worked for the Rutland & Burlington Railroad in 1848, laying down tracks in Vermont. *Id.* at 3. While preparing to detonate large rocks, Gage was distracted by nearby conversation and accidentally tamped the explosive powder with an iron bar, causing the powder to ignite. *Id.* at 4. The ensuing explosion was so fierce that the iron bar flew through Gage's hand, entered his left cheek, pierced the base of his skull, traversed the front of his brain and exited through the top of his head at high speed, landing more than one hundred feet away. *Id.* That Gage was not killed instantly was truly amazing, as evidenced by local newspaper reports. *Id.* at 5. What was even more shocking was the account of the incident reported by the *Boston Medical and Surgical Journal*: Following the explosion, Gage exhibited a few convulsive motions, spoke within a few minutes thereafter, was carried onto an ox cart in which he sat erect during the trip to a nearby hotel and got out of the cart himself with some assistance from his co-workers. *Id.* He was pronounced cured in less than two months (he was, however, blind in one eye). *Id.* at 7.

Although Gage survived this ordeal, he no longer was the Phineas Gage his friends and colleagues had come to know. *Id.* One account of Gage's recovery noted that although he had no speech or language problems, "the equilibrium or balance, so to speak, between his intellectual faculty and animal propensities had been destroyed." *Id.* at 8. Once the acute phase of his brain injury subsided, it became apparent just how different a person Phineas Gage had become:

[He was] fitful, irreverent, indulging at times in the grossest profanity which was not previously his custom, manifesting but little deference for his fellows, impatient of restraint or advice when it conflict[ed] with his desires, at times pertinaciously obstinate, yet capricious and vacillating, devising many plans of future operation, which [were] no sooner arranged than they [were] abandoned.

Id. Gage used language so foul that women were advised to stay away from him, yet Gage failed to return to good behavior. *Id.* Employers could not work with him, and he was routinely dismissed for poor discipline or, instead, quit in a "capricious fit." *Id.* at 8-9. Soon, he became a circus attraction at Barnum's Museum in New York City, displaying his wounds for those who had interest. *Id.* at 9. Eventually, Phineas Gage's life disintegrated completely. Unable to hold a job, Gage ended up in San Francisco, drinking and brawling until his death on May 21, 1861, as a result of severe epileptic seizures. *Id.* at 9-10.

According to Damasio:

Gage's example indicated that something in the brain was concerned specifically with unique human properties, among them the ability to anticipate the future and plan accordingly within a complex social environment; the sense of responsibility toward the self and others; and the ability to orchestrate one's survival deliberately, at the command of one's free will.

Id. at 10. Before Gage's experience, scientists' understanding of the brain was quite limited. *Id.* Following Gage's ordeal, however, scientists came to realize an exceptional truth: "The observance of previously acquired social convention and ethical rules could be lost as a result of brain damage, even when neither basic intellect nor language seemed compromised." *Id.* Somehow, there existed in the human brain systems that were dedicated to the personal and social dimensions of reasoning. *Id.* Gage had once had a sense of personal and social responsibility,

I am not sure if we can prove that one has a “mind” or a “soul,” or describe the thought processes of the brain. We do know, however, that we each have a brain, nervous system and genes that make us the individuals we are. I am not sure if one can adequately describe “insanity” or “mental illness” so that they are workable concepts that a jury can use when assessing the guilt of an accused. We do know, however, that if physiological diseases, pathologies and brain or neurological dysfunctions exist in the offender, we can scientifically establish specific neurologic diagnoses.⁶⁷ Then brain defects, mental illness, retardation, emotional stress or genetics, if they are the reason for the offending act, can provide solid scientific bases for treatment or penal options, rather than simply conflicting bits of evidence that lead to what may be an arbitrary decision by twelve lay persons, followed by another almost-arbitrary decision on how to sentence the offender. Science is an enterprise to discover, to propose solutions for, and to answer ultimate questions such as these.⁶⁸ It is time to bring law into alignment with

exemplified by the ways in which he had advanced within his employment, cared for the quality of his work and related to his employers and colleagues. *Id.* at 11. Nevertheless, following his accident, Gage lost all respect for social convention, violated all sorts of ethical standards and made decisions without regard to his best interests. *Id.*

In his discussion of Phineas Gage, Damasio posits that Gage's dilemma was that he was a victim of *dissociation*—Gage's degenerated character was at odds with the intactness of his attention, perception, memory, language and intelligence. *Id.* Other patients who have lesions located on different parts of the brain, exhibit somewhat different forms of *dissociation*, such as where the patient's language skills have been impaired while character and all other cognitive skills remain intact, thereby confirming that *dissociation* like that suffered by Phineas Gage is not entirely unique. *Id.* at 12. If nothing else, the story of Phineas Gage reveals just how complex the human brain truly is, and that we still have much to learn about the role it plays in our social development and existence.

67. See generally Pamela Y. Blake et al., *Neurologic Abnormalities in Murderers*, NEUROLOGY, Sept. 1995, at 1641-46 (reporting results of neurologic study of 31 murderers between 1989 and 1993). Dr. Blake, along with Dr. Jonathan H. Pincus and Dr. Cary Buckner, established specific neurologic diagnoses in 20 of these 31 subjects. *Id.* at 1643.

68. Nygaard, *supra* note 6, at 421-22 n.11.

Development in science is nearly the antipole of development in the law and the legal system. In science, a proposition is only stated as law after scientists: (1) observe a phenomenon; (2) hypothesize about it; (3) test it; and (4) rule out alternative hypotheses with repeated observation and testing. In addition, the proposition must be generally accepted by the scientific community and substantiated by colleagues and critics who replicate the original studies. In contrast, within the legal system and more specifically the criminal justice system, the law posits and defines the norm and, hence, the deviations. Hypotheses need not be accurate, only popular. Indeed, under the case law method, a decision reached by a court in one case is law and likely to control many others until determined by the court, a reviewing court, or a legislature to be wrong.

Id. (citation omitted).

reality and science. Science can help us to determine whether the offender presents us with a moral problem or a medical problem we must rectify.⁶⁹

To me, the traditional retrospective approaches to the accused's state of mind as preconditions to a ritual passage through the criminal justice screen toward, and to rationalize, punishment are absurd. Indeed, these approaches successfully divert our attention from appropriate, prospective and problem-solving approaches to behavior control. I submit that each traditional philosophical justification for punishment is seriously flawed, not just from difficulties of proof and the realities of misuse, but because nothing in a convicted offender's past can fully justify what we do *now* in the form of a prison sentence for any offender we intend to release.⁷⁰ The past is useful only as a portion of the diagnosis by which we must determine how to correct or contain the offender and prevent future infractions.

As I have suggested, it makes no sense at all to consider "sanity" when deciding culpability. All humans lie along a mental continuum some place between Zilboorg's "drooling idiot" and the theoretical, entirely rational and calculating being.⁷¹ A person's position on the continuum means little to the equation of criminality—all of us are capable of antisocial acts. I suggest that we abandon the polemic of sanity as solely a function of determining culpability, and instead turn our greatest attention to mental condi-

69. See generally Blake et al., *supra* note 67, at 1641-46 (discussing how neurologic impairment may contribute to violence); C. Ray Jeffery, Ph.D. et al., *Crime, Justice, and Their Systems: Resolving the Tension*, 16 CRIMINOLOGIST 1, 5 (July-Aug. 1991) ("New knowledge of human behavior can be used to prevent crime. Crime prevention can be either at the individual level or environmental level. Several examples of crime prevention at the individual level can be cited. People who are violent are often low in the neurotransmitter serotonin. Serotonin is a product of amino acids which can be gotten from diet or from health food stores. Violent offenders have been shown to have abnormal levels of nutrient minerals and high levels of toxic minerals such as lead, cadmium, mercury, and aluminum. A California study involving prison inmates found excessive levels of manganese in hair samples taken from the inmates. Cocaine releases and then depletes the dopamine and serotonin supplies in the brain.").

70. See generally Michael Vitello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991) (suggesting that rehabilitation should be reconsidered in sentencing). Vitello asserts that retributive punishment ignores the offender's ability to transform into a more developed, moral person. *Id.* at 1049-50. Thus, when transformation occurs, it is difficult to find a continuing justification for imposing suffering that is based on past behavior. See *id.* at 1051 (noting that if offender transforms himself into new person, law cannot punish him for act of another).

71. See ZILBOORG, *supra* note 1, at 274 (stating that most individuals, including most criminals, know what they are doing, nature of their acts and consequences of their actions).

tion and capacity after the factfinder has determined, in a "whether" portion of a trial, that the accused "did it." The court can then determine "why" the offender committed the act, and employ the finding or findings to develop the appropriate punitive, remedial and/or corrective measures (or some combination thereof). "Sanity," "diminished capacity" and "insanity," whatever they mean, are only bits of semantic nonsense that we should remove from the "whether" portion of the trial. Crimes should be redefined so that mental condition is left to the calculus of what must be done to one after there has been a determination that the defendant has offended our criminal rules and is a danger to himself or to others.⁷²

I suggest that we consider revising our penal codes and trial procedures to limit the extent of the initial trial or plea of admission to whether the accused performed an act that fits the legal definition of something that has been declared a crime. A positive finding or a plea of admission on that issue would then bring the accused to a status that would require the court to consider remedial measures to be employed, such as containment, punishment, therapy, release or total pardon and discharge, or some combination of those measures.⁷³ This procedure would apply to all offenders, wherever they may lie along the mental condition continuum.

I submit that the criminal justice delivery system should deal with defendants who claim a mental deficiency by bifurcating those individuals' trials into two stages: (1) a trial phase to determine whether the accused performed the forbidden act; followed by (2) a second phase to discover the reasons why the offender committed the act and whether it was a product of the will or determined in whole or part by genetics, emotional stress, mental defect or any combination of a host of reasons.⁷⁴ The first phase would focus

72. See BRAKEL & ROCK, *supra* note 39, at 421 (suggesting specifically that "[a] thorough mental examination by a panel of impartial experts should be available to all persons accused of serious crime and should be mandatory for all defendants raising the issue of criminal irresponsibility, provided that the procedural protections of a criminal proceeding be made applicable to such examination"). I fully endorse their suggestion.

73. Carol Isaac Barash, *The Insanity Defense: Legal Incoherence Equals Conceptual Confusion*, in PHILOSOPHY OF LAW, POLITICS, AND SOCIETY (PROCEEDINGS OF THE 12TH INTERNATIONAL WITTGENSTEIN SYMPOSIUM) 128-31 (Holder-Pichler-Tempsky eds., 1988). Dr. Barash points to the incoherence of our penal theory, drawing, as it does, a dichotomy between mental condition as a mitigating (resulting in less punishment) and as an excusing (wholly exculpating) condition. *Id.* I would go further and set both aside as we merely look at the offender's "condition" wheresoever it lies on the mental health continuum and then fashion a remedy.

74. See, e.g., *People v. Wells*, 202 P.2d 53, 65 (Cal. 1949) (en banc) (stating that where insanity is pleaded as defense to criminal charge, trial is broken up into

solely on whether the Government has proven beyond a reasonable doubt that the defendant performed the crime for which he has been charged.⁷⁵ Mental capacity would not be an issue during this initial phase of the trial.⁷⁶ Rather, in this portion of the trial, the finder or finders of fact are to "look at the defendant's actions and rely on their own perceptions, experiences, and common sense to determine whether the defendant formed the specific intent necessary for the crime."⁷⁷

If the prosecution is able to establish beyond a reasonable doubt that the defendant performed the act, the case would proceed to the second phase, devoted entirely to considering not only the defendant's mental capacity, but the full ecology of the crime and the criminal, with a view toward finding the reasons why the offender performed the prohibited act, and toward determining an appropriate remedy for him.⁷⁸ Under my proposed revisions, line-

two sections or stages, but in eyes of law there is still only one trial); *People v. Villarreal*, 213 Cal. Rptr. 179, 181 (Ct. App. 1985) (outlining procedure for employing bifurcation); *Lucas v. United States*, 497 A.2d 1070, 1072 (D.C. 1985) (explaining bifurcation process); *Novosel v. Helgemore*, 384 A.2d 124, 129 (N.H. 1978) ("In the normal course, . . . the not guilty plea coupled with an insanity defense should be bifurcated upon request of the defendant."); *State v. Brink*, 500 N.W.2d 799, 802-03 (Minn. Ct. App. 1993) (discussing system of bifurcation required in accordance with Minnesota Rules Criminal Procedure 20.02 whenever defendant pleads "not guilty" and also raises defense of insanity).

75. *State v. Burnham*, 406 A.2d 889, 894 (Me. 1979); *Brink*, 500 N.W.2d at 802.

76. *Villarreal*, 213 Cal. Rptr. at 181 ("Since legal insanity is presumed at the first phase of the trial, evidence to show the existence of legal insanity is barred *on that issue* at that stage."); *Burnham*, 406 A.2d at 894 (noting that defendant may elect bifurcated trial in which issue of guilt is tried first and issue of insanity tried second only if jury should find defendant to be guilty); *State v. Provost*, 490 N.W.2d 93, 102 (Minn. 1992) (stating that it is duty of factfinder, not expert psychiatrist as "thirteenth juror," to examine what defendant said and did to determine whether defendant had requisite criminal intent); *State v. Bouwman*, 328 N.W.2d 703, 705-06 (Minn. 1982) (holding that expert psychiatric opinion testimony was not admissible in guilt stage of bifurcated trial to show that mentally ill defendant lacked capacity to form specific intent to kill); *Brink*, 500 N.W.2d at 803 ("At this stage, the defendant has the right to introduce all competent, relevant evidence disputing the facts upon which the inference of the fact of intent is sought to be established by the prosecution. . . . As a general rule [evidence in the form of expert psychiatric testimony] is not admissible in [the 'guilt phase'].") (citation omitted); *Novosel*, 384 A.2d at 129 ("The bifurcation results 'in the complete legal separation of "guilt" from "sanity" because the factfinder in the guilt phase is not allowed to hear any evidence of mental disease or defect until guilt has been determined.'") (quoting Comment, *Mens Rea and Insanity*, 28 ME. L. REV. 500, 500 (1977)).

77. *Brink*, 500 N.W.2d at 803.

78. *E.g.*, CAL. PENAL CODE § 1026 (West 1996); ME. REV. STAT. ANN. tit. 17-A, § 40 (West 1996); *Lucas*, 497 A.2d at 1072 ("If the jury reaches a not guilty verdict [in the first phase of the trial], the insanity defense becomes moot. If, however, the jury returns a guilty verdict, the trial proceeds to the insanity phase."); *Brink*,

drawing to determine responsibility need not preoccupy us. In the second phase of the trial, the finder(s) of fact must determine the full extent of the defendant's mental capacity, not just the capacity to form the intent to commit the crime with which he has been charged.⁷⁹ This second phase would also enable the court to make other findings germane to the remedy, such as the *extent* or *degree* to which mental derangements or infirmities, and all motivators and actuators, may have contributed to the crime. In this phase of the trial, *all* reasons for the crime and *all* deficiencies of the offender would be explored to determine a corrective response to his act. In addition, the court would not concern itself with requiring the social or physical scientist's analysis to fit into the legal system's definition of "insanity" or "mental disease of defect," or other similarly nebulous and often psychologically meaningless terms. Arbitrary sanity/insanity lines would be rejected and each offender would be described in terms of who he is, morally, mentally, emotionally and genetically; what shall be required of him before he is released; and what the health, mental health, correction or penal systems must contribute to support the process. The court, at this phase, would admit whatever expert and lay testimony "is competent and relevant to show the defendant's cognition, volition, and capacity to control his or her behavior,"⁸⁰ and not be limited simply to a binary yes/no finding about sanity as an exculpatory condition, the goal being to devise a humanitarian response to one who has committed an anti-social or criminal act, and who is a danger to society if left untreated or untended. I suggest that although we must say to the offender, "You are all screwed up and must change," we must add, "And we are here to help you."

I do not diminish the need to show an accused's basal capacity to form intent. I do, however, suggest that presently the tests for intent are unscientific and unrealistic. I also suggest that given the myriad of actuators that come into play in human behavior, this phase should be expanded to become the basis for remedial decisions for all who transgress the law. One who lacks the requisite mental capacity, whether due to mental impairment or some kind

500 N.W.2d at 803 ("The second part of an insanity trial is devoted solely to a consideration of whether the defendant has proved the statutory defense of mental illness. . . ."); *State v. Hoffman*, 328 N.W.2d 709, 717 (Minn. 1982) ("The accused's mental capacity to formulate the requisite intent presents an opportunity for the presentation of relevant medical testimony, but the ultimate issue involves his criminal responsibility.").

79. *Brink*, 500 N.W.2d at 803.

80. *Id.*

of brain disfunction, may not be found "guilty" in the contemporary sense but may, nonetheless, require some form of commitment to protect society from further predatory acts. Alternatively, one who has full capacity and brain function may require full and long-term commitment in prison. Nevertheless, between the polar extremes on the continuum, lie the remainder of the 500,000 persons whom we incarcerate every year. To arrive at an informed sentencing action, I suggest that remedial goals be established for them as well, consistent, of course, with their mental condition and all other factors influencing behavior.

The basic concept of bifurcated trials has received some support at the state level.⁸¹ Several states have codified split criminal trial procedures into their statutory scheme, whereby the defendant who pleads "not guilty by reason of insanity" is tried in two phases.⁸²

81. The bifurcated trial has been recognized as appropriate in numerous jurisdictions for long periods of time. *State v. Devine*, 372 N.W.2d 132, 136 (S.D. 1985). In Wisconsin, bifurcated proceedings were first provided for by statute in the nineteenth century, and in *Bennett v. State*, 14 N.W. 912 (Wis. 1883), such statute was found to comport with the state constitution. *Id.* at 916 ("[T]here is no constitutional objection to the statute which requires the accused to plead insanity at the time of the commission of the offense charged, as a separate defense to the information, together with the plea of not guilty."). In California, Penal Code § 1026 has been in existence, in one form or another, since 1927, and was upheld as constitutional in *People v. Troche*, 273 P. 767, 770-72 (Cal. 1928). In some states, the bifurcated trial may be conducted as a matter of course pursuant to statute when the defendant pleads "not guilty by reason of insanity." *People v. Phillips*, 153 Cal. Rptr. 359, 362 (Ct. App. 1979); *State v. Spurgin*, 358 N.W.2d 648 (Minn. 1984); *Commonwealth v. DiValerio*, 423 A.2d 1273, 1276 (Pa. Super. Ct. 1980). Other states have discussed the appropriateness of bifurcation in the absence of a statute and have permitted bifurcated trials only when the defendant shows he has a substantial insanity defense and a substantial defense on the merits of any element of the crime for which he has been charged, and that either defense may be prejudiced by the other in a unitary trial. *E.g.*, *Houston v. State*, 602 P.2d 784, 787 (Alaska 1979); *Garrett v. State*, 320 A.2d 745, 748 (Del. 1974); *People v. Alerie*, 458 N.E.2d 1106, 1114-15 (Ill. App. Ct. 1983); *State v. Monk*, 305 S.E.2d 755, 760-61 (N.C. Ct. App. 1983). In the District of Columbia, courts have ruled that the decision to bifurcate and the procedure to use in a bifurcated proceeding are solely in the discretion of the trial judge. *Jackson v. United States*, 404 A.2d 911, 925 (D.C. 1979); *Harris v. United States*, 377 A.2d 34, 39 (D.C. 1977). In *Devine*, the Supreme Court of South Dakota determined:

[U]pon request of the defendant for a bifurcated trial based on incriminating statements made during a psychiatric examination in connection with a plea of not guilty by reason of insanity, the court, in order to protect the defendant's Fifth Amendment rights should generally direct a bifurcated trial. . . . When a bifurcated trial is ordered, the court should also prescribe its procedures.

Devine, 372 N.W.2d at 137.

82. *E.g.*, CAL. PENAL CODE § 1026; ME. REV. STAT. ANN. tit. 17-A, § 40; MD. CODE ANN., CTS. & JUD. PROC. § 4-314 (1995); WIS. STAT. ANN. § 971.165 (West 1995); WYO. STAT. ANN. § 7-11-305 (Michie 1977); MINN. R. CRIM. P. 20.02. In Colorado, the bifurcated trial procedure was prescribed by statute, and could be employed for trials concerning offenses committed before July 1, 1995. COLO.

In these states, courts have discussed the propriety of the bifurcated trial and have supported it, recognizing its effectiveness in permitting the criminal justice system to deal properly with defendants who plead mental deficiency.⁸³ Courts that have interpreted such rules and statutes generally have recognized that bifurcation protects the integrity of the criminal defendant's trial, permitting the court and the jury to better understand and deal with the defendant and his behavior—namely, did the defendant commit the crime, and if so, why? “The bifurcation procedure serves to mitigate two types of prejudice that might occur in a unitary trial: ‘(1) prejudice to a defendant's insanity defense arising from the evidence on the merits, and (2) prejudice to a defendant's defense on the merits arising from the insanity evidence.’”⁸⁴

Of course, there have been a number of challenges to the constitutionality of statutorily mandated bifurcated trial procedures. Unless the laws are crafted carefully, new trial procedures established for the separate adjudication of guilt and mental state may deny the defendant his right to due process.⁸⁵ The insanity defense

REV. STAT. ANN. § 16-8-104 (West 1996). The state legislature, however, added new provisions to the Colorado Revised Statutes in 1996 to create a unitary process for hearing issues raised by the affirmative defense of “not guilty by reason of insanity” in cases involving offenses committed on or after July 1, 1995. *Id.* §§ 16-8-101.3, 16-8-104.5.

In Wyoming, the state supreme court found its statute, which required a bifurcated proceeding where the defendant pleads “not guilty by reason of insanity,” to be an unconstitutional violation of due process of law. *Sanchez v. State*, 567 P.2d 270, 278 (Wyo. 1977).

83. *E.g.*, *Lucas*, 497 A.2d at 1072-73 (noting that bifurcation mitigates prejudice to defendants); *Price v. State*, 570 A.2d 887, 892 (Md. Ct. Spec. App. 1990) (noting that bifurcation simplifies first phase of trial); *Novosel*, 384 A.2d at 129 (recognizing that bifurcation avoids juror confusion).

84. *Lucas*, 497 A.2d at 1072-73 (quoting *Jackson v. United States*, 404 A.2d 911, 925 (D.C. 1979)); *see also* *United States v. Green*, 463 F.2d 1313, 1314-15 (D.C. Cir. 1972) (upholding trial court's decision to grant bifurcated proceeding in view of fact that substantial prejudice could result from unitary trial as insanity plea requires testimony that alleged crime was product of accused's mental illness and such testimony will typically make jury believe that accused committed crime with which he has been charged, and as evidence of past anti-social propensities may be highly prejudicial with respect to other defenses); *State v. Khan*, 417 A.2d 585, 592 (N.J. Super. Ct. App. Div. 1980) (stating that bifurcation may be warranted, even where defendant does not request bifurcated trial as to guilt and insanity, where necessary to prevent possible miscarriage of justice).

85. *See, e.g.*, *State v. Shaw*, 471 P.2d 715, 725 (Ariz. 1970) (holding that to comply with due process, statute providing for bifurcation would have to be interpreted as allowing admission of all evidence at first phase of trial, including evidence as to mental capacity to commit crime, but that to do so would emasculate act in such way that it would not be carrying out purpose for which it was intended); *State ex rel. Boyd v. Green*, 355 So. 2d 789, 792-93 (Fla. 1978) (stating that *M'Naghten* rule, applicable in Florida, specifically contemplated lack of essential element of crime—intent—and that barring defendant from introducing evidence

is based on the defendant's inability to form the requisite intent for the crime charged—because intent/*mens rea* is a component of most crimes, the argument follows that lack of *mens rea* precludes criminal responsibility, and should ordinarily result in an acquittal following the “guilt” phase (first phase) of the trial.⁸⁶

Although some types of bifurcated trial procedures have been attacked successfully on constitutional grounds in Arizona, Florida and Wyoming,⁸⁷ courts in other parts of the country have dismissed constitutional challenges, and have found that their bifurcation procedures comport with traditional notions of fair play.⁸⁸ In Wisconsin, for example, courts have held that the state's bifurcation procedure does not violate the requirements of due process, noting that a finding of insanity “is not a finding of inability to intend; it is rather a finding that under the applicable standard or test, the defendant is to be excused from criminal responsibility for his acts.”⁸⁹ In *Steele v. State*,⁹⁰ the Supreme Court of Wisconsin further justified the propriety of bifurcated trial procedure by ruling that admission of psychiatric evidence during the guilt phase of the trial would

of lack of intent during first phase of trial creates system contrary to due process); *Sanchez v. State*, 567 P.2d 270 (Wyo. 1977) (same).

86. *Green*, 355 So. 2d at 792; *Sanchez*, 567 P.2d at 278. Opponents of bifurcation state that unless a defendant is permitted to introduce evidence as to his lack of *mens rea* in the first phase of the bifurcated trial, he is being denied his due process rights—the factfinder cannot make a determination of guilt without evidence pertaining to the accused's mental state. *Shaw*, 471 P.2d at 724; *Green*, 355 So. 2d at 792-93.

87. For a discussion of those cases in which bifurcation was successfully attacked in Arizona, Florida and Wyoming, see *supra* notes 85-86 and accompanying text.

88. *E.g.*, *People v. Wells*, 202 P.2d 53, 68 (Cal. 1949) (en banc) (stating that California Penal Code § 1026, providing for bifurcation, does not violate defendant's due process rights because “[t]he defendant is still presumed to be innocent at all stages of the trial of all factual elements of guilt, notwithstanding the conclusive presumption, at the first stage, that he is sane”); *People v. Troche*, 273 P. 767, 770 (Cal. 1928) (“Due process of law is not limited to the due process of the settled usages of the past, but may include new methods of procedure unknown to the common law, provided they are in harmony with the accepted underlying principles of such procedure according to the traditions of the common law.”); *Lucas*, 497 A.2d at 1072-73 (noting that bifurcation actually mitigates prejudice to defendant); *Jackson*, 404 A.2d at 925 (same); *Steele v. State*, 294 N.W.2d 2, 8 (Wis. 1980) (same); *State v. Hebard*, 184 N.W.2d 156, 164 (Wis. 1971) (noting that due process is served by permitting defendant to elect bifurcated trial procedure).

89. *Hebard*, 184 N.W.2d at 163. It is important to note that in Wisconsin, the defendant has the choice of being tried under the bifurcated procedure or having all issues determined in a unitary proceeding. *Id.* at 160. In Arizona and Wyoming, the statutes discussed in *Shaw* and *Sanchez* mandated that a bifurcated trial be held where the defendant entered a plea of “not guilty by reason of insanity.” *Shaw*, 471 P.2d at 720-21; *Sanchez*, 567 P.2d at 277.

90. 294 N.W.2d 2 (Wis. 1980).

jeopardize safeguards designed to protect the defendant as well as society.⁹¹ California has had a bifurcated system since 1927 and permits evidence of diminished capacity, going to the issue of intent, during the guilt phase of the trial.⁹²

The bifurcation I suggest, however, places greater emphasis upon mentality and causation. I have suggested that we abandon our preoccupation with punishment, and direct our attention to devising pragmatic and humane remedies for all offenders. One who lacks the requisite mental capacity to "intend," and thus does not have a "guilty mind," may nonetheless require considerable help. We err when we myopically look at our system as a screen to filter out those whom we do not want to, or feel we cannot, punish.⁹³ There are many people passing through the criminal justice system who just need help, regardless of whether they plead their mental condition as a defense. The myth that punishment cures crime frustrates our system at each turn. Next, the almost wholly arbitrary decision as to who knows "right" from "wrong" and, hence, the decision whether to label one either mentally ill or criminal results in a gross disparity: one gets treatment in an atmosphere of safety if deemed mentally defective, *or* punishment in an institution of danger if adjudged normal. "[A]ny intelligent parent and anyone else who has had experience in child rearing knows that behavior problems are not merely a matter of fail[ing] to 'know' [right from] wrong."⁹⁴ When we seek professional help to correct a child, especially one with a serious problem, we would

91. *Id.* at 13-14. The court in *Steele* noted that under Wisconsin's bifurcated procedure, during the guilt phase of the trial, courts would not exclude from admission ordinarily admissible evidence tending to prove the defendant's state of mind. *Id.* at 14. What is barred during this phase is expert opinion testimony tending to prove or disprove the defendant's capacity to form the required criminal intent. *Id.*

92. *People v. Wetmore*, 583 P.2d 1308, 1314 (Cal. 1978). The court in *Wetmore* held that evidence of diminished capacity is admissible during the guilt phase of the bifurcated trial regardless of whether that evidence would also be probative of insanity. *Id.* The Supreme Court of Florida, in *Green*, acknowledged that because the doctrine of diminished capacity was not available in Florida, and could not be used in conjunction with the Florida bifurcation statute, it was further convinced that the Florida statute violated due process. *State ex rel. Boyd v. Green*, 355 So. 2d 789, 794 (Fla. 1978).

93. *See, e.g., Ginzburg v. United States*, 383 U.S. 463, 477 (1966) (Black, J., dissenting) (noting that "bad governments" wrote their laws in "unknown tongue," leaving important task of imposing punishment to unbridled discretion of trial court).

94. WEIHOFEN, *supra* note 49, at 26-27.

never limit the counselor to deciding whether the child knew better.⁹⁵ We want answers. We want solutions.

The criminal law corrections mechanism is similar. It is, or at least should be, all about behavior. Behavioral control requires that we consider a myriad of actuators and motivators, and be prepared to respond to them. As Dr. Philip Q. Roche says, "our criminal law is a child rearing system for grownups."⁹⁶ It matters little to public safety whether one who committed a crime "knew better."⁹⁷ Rather, it matters that a law has been broken and that we need to contain an offender until that person has been corrected or treated so that society may once again become safe from further breaches of the public order by him. Whether one is a psychopath, sociopath or rational criminal, he should not be on the street until he has been controlled, cured or otherwise corrected.

Finally, I note that the test for insanity and responsibility is most often employed, in a most crucial sense, where it is probably least germane—in trials on a charge of homicide. Here, the procedural interplay is between the accused, who is at risk of losing his life for taking another's, and the public, whose paranoia over crime is at the site of its deepest roots, the loss of a victim's life. It is also here that we intuitively conclude that an offender must be at his most antisocial and inhuman limits because he actually took another's life. That makes one who would be so callous seemingly the most fitting for the ultimate act of revenge. This may not be so, however, because here we also find offenders who are the least stable emotionally, morally and culturally.⁹⁸ As Bernard C. Glueck, Jr. observed years ago in America's most stable decade, the 1950s: "It is my personal opinion . . . that no person in our society is in a normal state of mind when he commits a murder."⁹⁹

95. *Id.* at 27 (citing Philip Q. Roche, *Criminal Responsibility*, in *PSYCHIATRY AND THE LAW* 108 (Paul H. Hoch & Joseph Zubin eds., 1955)).

96. Roche, *supra* note 95, at 108.

97. WEIHOFEN, *supra* note 49, at 27.

98. There are many killings, however, by those whom we do not consider antisocial, inhuman and callous. We kill each other by the millions in politically justified actions called wars. Manufacturers routinely calculate the potential that their product's design may cause loss of life—and then manufacture knowing that users will be killed. Speed limits are set as a result of a compromise between impatience and safety, and have recently been raised even in the face of statistical evidence that many more motorists will be killed as a result. Death is very much with us.

99. Bernard C. Glueck, Jr., *Changing Concepts in Forensic Psychiatry* 45 J. CRIM. L. & CRIMINOLOGY 123, 130-31 (1954); *see also* Blake et al., *supra* note 67, at 1641-46 (conducting study of murderers and finding brain dysfunction at root of their violent behavior). Blake and her associates examined 31 murderers and found none of them "normal in all spheres," and in 20 of the 31 they found more than one neurologic diagnosis. *Id.* at 1643. Evidence continues to accumulate that neuro-

Yet, it is only he who has killed whom we in turn would kill for committing the crime. Is the person who has committed a killing when mentally out of control, suffering from some brain dysfunction, or experiencing a life crisis, worse than the person who makes a calculated decision to become a career dope peddler, importer or manufacturer? Should not the passionate offender be easier to deal with dispassionately than, for example, a person or corporation who commits mass destruction of life, liberty and property, coolly, deliberately and to make a profit? And do not these offenders really deserve worse? I answer, "no," "yes," and "yes."

I do not necessarily advocate death as a penalty. I agree with Beccaria,¹⁰⁰ and do not believe we should lightly destroy that which we cannot create.¹⁰¹ The death option may be penologically necessary in certain situations, but only as a last resort and when other efforts at correction fail.¹⁰² What I do emphasize here are the unending difficulties we encounter when we fail to take a pragmatic approach to solving the problem of crime and behavior control.

I suggest that upon close examination we will conclude that an offense-based penal structure, whose response is wholly punitive, is philosophically and practically deficient, and we will discover that we must personalize sentences. To provide essentially the same remedy to all offenders, regardless of their physical, biological,

logic and psychiatric diseases may be at the root of significant numbers of violent crimes. *See id.* at 1641 (discussing literature indicating that violent behavior often results from malfunctions in brain centers within limbic system and temporal lobes).

100. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT § 28 (David Young trans., 1986) (1764).

101. *See id.* (asking "Is it not absurd, that the laws, which detect and punish homicide, should, in order to prevent murder, publicly commit murder themselves?"). Beccaria stated that the punishment of death is not authorized by any right. *Id.* Rather, "it is . . . a war of a whole nation against a citizen, whose destruction they consider as necessary or useful to the general good." *Id.* Beccaria believed that there could be no necessity for taking one's life, unless the person's existence posed a threat to the security of the nation. *Id.* *See generally* Francis Edward Devine, *Cesare Beccaria and the Theoretical Foundation of Modern Penal Jurisprudence*, 7 NEW ENG. J. PRISON L. 8, 21 (1981) (tracing Beccaria's influence on modern penal jurisprudence commonly known as "classical criminology").

102. Richard Lowell Nygaard, *On Death as a Punishment*, 57 U. PITT. L. REV. 825, 828 (1996). There are four justifications for punishment: (1) rehabilitation; (2) deterrence; (3) containment; and (4) retribution. *Id.* The death penalty does not rehabilitate, and its deterrent effect has not been shown. Containment is problematic because it detains one for acts he has not committed and may never commit and, even if free of all problems, there are alternative containment methods. Although death is the ultimate form of retribution, it is antithetical to a civilized society. *Id.* at 828-33. For a further discussion of the justifications given by penologists and other legal scholars for the imposition of punishment, see *supra* notes 12-22 and accompanying text.

mental or social condition, but who have committed the same crime, is equivalent to prescribing the same treatment for all ill persons whatever the kind or degree of illness. Offense-based punishment is like placing a bandage on the cancerous lesion while ignoring the cause of the cancer, or equivalent to putting a balm on the open sore while ignoring the bacteria causing it. Every offender's sentence must treat him for his mental, personal and social deficiencies, and not be simply a blanket treatment for one who is identified by the rule he violated.¹⁰³ The sentence cannot, however, be personal unless we know all about the offender that the physical and social sciences can tell us, and unless we are prepared to engage all contemporary technology to model for him the appropriate remedial goals, means and tests for progress and compliance.

We who would reform must remember, nonetheless, that although mental or other circumstances may explain crime, they do not excuse it.¹⁰⁴ I believe in full accountability. Each offender must account for his actions and, to the degree to which he has the capacity or will, to perform voluntary acts or refrain from them. This accountability cannot function fully in an all-or-nothing, sane/insane determination, in which we merely determine whether the offender is responsible or excusable, and from which we decide whether we should send the offender to prison or a mental ward.

I believe that the criminal justice system should react to infractions of the law by imposing a treatment, a punishment or a combination of both, that is proportionate to the needs and deficiencies of the individual being sentenced, while being consistent with the overall goal of public safety. We must make offenders realize that they as individuals are morally accountable and, if mentally and morally capable, hold the keys to their release—by conforming to the norms and goals of free society. In addition, we must view every sentence as a death-rebirth experience—i.e., a chance to bury an offender's past and create a responsible, productive citizen.¹⁰⁵

103. See, e.g., Stephen B. Bright, *The Electric Chair and the Chain Gang: Choices and Challenges for America's Future*, 71 NOTRE DAME L. REV. 845, 847 (1996) (noting that state and federal governments are passing legislation requiring more mandatory sentences and inflexible sentencing guidelines for individual crimes).

104. See, e.g., *United States v. Currens*, 290 F.2d 751, 775 (3d Cir. 1961) (stating that although accused suffers from mental disease, he is still responsible for criminal act if jury finds beyond reasonable doubt that when accused acted, disease had not sufficiently weakened his capacity to conform his conduct to requirements of law).

105. See Nygaard, *supra* note 15, at 693 (asserting that we should only release productive and law-abiding citizens, not merely ex-prisoners or criminals). Moreover, this release must be carefully coordinated and be implemented gradually. *Id.* As philosopher of criminal law, Jeremy Bentham, urged:

Thus, we must call upon expertise from all the sciences in reforming and transforming the behavior of our social deviates.

In an aeroplane or train accident, the cause is normally sought in the immediate circumstances, rather than in any underlying physical or psychological abnormality in the persons concerned; and these circumstances are accordingly examined with the utmost thoroughness.¹⁰⁶

We spend much time on that which may well be spectacular but whose ramifications and pain touch comparatively few lives, and yet we expend little effort to discover the causes and cures for crime, which causes grief for an entire culture. As Wootton concludes:

The nature of the disease is not understood, and the treatment therefore palliative rather than curative: and the same could be true of criminality. At the same time a more sinister interpretation in the case of criminality is also possible—namely, that the treatment itself aggravates the disease.¹⁰⁷

The conclusion is obvious to me: We must look for causes, explore cures and accept, rather than manipulate, answers to the question—"what works?" The preliminary decision in sentencing at present is: Whom should we incarcerate and for how long? As it now stands, courts for the most part impose determinate sentences set by a legislature far from the factual scenario of the individual case, in a procedure that is wholly ignorant of the victim, the ecology of the crime and the person to be sentenced. These legislatively-imposed sentencing schemes cannot productively determine whether the accused is a danger, or if he is, what is necessary to neutralize his danger. Nor can these sentencing schemes determine when a particular individual will no longer be a danger and be capable of once again returning to society. This makes both the sentence and its duration nearly arbitrary. Determinate sentences,

"A convict after having finished his term of imprisonment, ought not to be restored to society without precautions and without trial. Suddenly to transfer him from a state of surveillance and captivity to unlimited freedom, to abandon him to all the temptations of isolation and want, and to desires pricked on by long privation, is a piece of carelessness and inhumanity which ought at length to attract the attention of legislators."

Id. (quoting COLEMAN PHILLIPSON, *THREE CRIMINAL LAW REFORMERS: BECCARIA, BENTHAM, ROMILLY* 211 (1923)).

106. WOOTTON, *supra* note 3, at 22.

107. *Id.* at 4.

unless followed by and coupled with an indeterminate, goal-oriented period of corrective effort, bear almost no relationship to guiding the productive principles of penology.

Our legislatures must begin to realize that to develop a pragmatic sentencing scheme, they cannot simply listen to the passions of society and react viscerally to them.¹⁰⁸ The public's anger and frustration are infirm bases upon which to build a dispassionate, businesslike system.¹⁰⁹ These emotions, while real and predictable, are counterproductive, and the laws enacted upon these bases are becoming far too expensive and, too obviously, are failures. We must take all we have discovered about human behavior and, as in science, carry our discoveries out to the next decimal, and the next. We must begin anew to amass empirical data on crimes and offenders with a view toward developing new sentencing formulas, modeled upon all the data we accumulate, while keeping a watchful eye on the goal—a safe and productive citizenry.

The simple get mad. The average get even. But the wise come out ahead. I suggest we start behaving like the last group. I am certain we will find that no one formula will solve all of the problems that cause crime. By progressing scientifically in our experiments, by sharing data, and by honestly accepting answers, however, I believe we can begin to renew our correctional system to respond to the deficiencies of the offender, whatever his crime, with a remedy that is designed to assure public safety. I suggest that

108. See, e.g., Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1713-15 (1996) (discussing various legislation requiring offender registration, community notification or DNA collection and registration, such as N.J. STAT. ANN. §§ 2C:7-6 to -11 (West 1995), known as "Megan's Law," which was enacted following strong public outcry resulting from murder of seven year-old by pedophile who had recently been released from incarceration). The opponents of "Megan's Law," which is intended to inform residents of the identities of convicted sex offenders living in their neighborhoods, argue that the law indefinitely strips the sex offender of his fundamental rights "based solely upon unreliable assessment of the convict's predilection to commit future sex crimes." *Id.* at 1715.

109. See, e.g., Thomas R. Goots, *A Thug in Prison Cannot Shoot Your Sister: Ohio Appears Ready to Resurrect the Habitual Criminal Statute—Will It Withstand an Eighth Amendment Challenge?*, 28 AKRON L. REV. 253, 253-54 (1995) (noting that killing of twelve year-old by "career criminal" resulted in large public outcry and led to California's swift implementation of "Three Strikes and You're Out" law). The general "Three Strikes and You're Out" law puts a three-time felon in prison for life, without a thought for rehabilitation. *Id.* at 254 n.8. Goots argues that these laws, such as Ohio's recently proposed habitual criminal statute, will protect society by keeping the habitual criminal off the street. *Id.* at 289.

this requires us to abandon the simple “responsibility/nonresponsibility” dichotomies and instead, to provide a wide range of options for individualized sentences, responding to the remedial needs of offenders, wherever they lie on the continuum between Zilboorg’s “drooling idiot” and the compassionless, calculating criminal.

